

# **Exhibit B**

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 BEFORE THE HONORABLE CHARLES R. BREYER, JUDGE

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5 David Lee, et al., )

6 Plaintiffs, )

7 v. )

NO. C 07-4765 (CRB)

8 American Express Travel, )

9 Defendant. )

San Francisco, California

Friday, November 30, 2007

(9 pages)

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11  
12 TRANSCRIPT OF PROCEEDINGS

13 APPEARANCES:

14 For Plaintiffs:

MATTHEW SCOTT HALE

Attorney at Law

45 Rivermond Drive

Post Office Box 1951

Newport News, Virginia 23601

17  
18 For Defendants:

Stroock & Stroock & Lavan LLP

2029 Century Park East

Suite 1800

Los Angeles, California 90067

20 BY: STEPHEN JULIAN NEWMAN

1 Tuesday, November 30, 2007

2 (10:14 a.m.)

3 DEPUTY CLERK: David Lee versus American Express.  
4 Appearances, Counsel?

5 MR. HALE: Matthew Hale for the plaintiffs.

6 MR. NEWMAN: Steven Newman for the defendants.

7 THE COURT: Good morning. Well, anybody have anything  
8 to add to what's been filed?

9 MR. NEWMAN: If I may, I'm the moving party, I think  
10 the standing issue is the critical one here. The plaintiffs  
11 here have ample other remedies if there is an issue with the  
12 arbitration clause and these can be raised in the context of a  
13 motion to compel arbitration of a particular dispute. If there  
14 is an arbitration, they can be raised in the context of the  
15 arbitration itself. If there is an award, they can be raised  
16 in proceedings to vacate or correct or enforce the award.

17 So your Honor simply doesn't have a live dispute  
18 before him. The claim is just: I'm a party to this contract  
19 and someday I might have something I'm going to arbitrate, I  
20 might have a problem with the arbitration clause.

21 THE COURT: Well, that was my impression. My  
22 impression is I don't have standing -- I mean, I have standing,  
23 but the plaintiffs don't. So you have --

24 MR. HALE: Yes, your Honor. Our position is there's  
25 nothing to arbitrate because arbitration is impossible at this

1 point.

2 THE COURT: Why is it impossible? You haven't made a  
3 claim for arbitration. You haven't sought arbitration. Let's  
4 say you seek arbitration. Then the arbitrator has to make some  
5 decisions, right? He could conceivably make some decisions in  
6 your favor. Could -- if you're so sure you're so right, and  
7 there you are. And he could throw out the class action  
8 requirement or limitation if he thought that that was  
9 appropriate from your arguments. He could do the things that  
10 you haven't even -- you're complaining about, but you haven't  
11 complained about it in front of the arbitrator.

12 MR. HALE: Your Honor, if I might.

13 THE COURT: Sure.

14 MR. HALE: Arbitration is impossible under the  
15 circumstances here because, first of all, down in Orange County  
16 in a superior court case Judge Carol Dunning in a response to  
17 their motion to compel arbitration ruled that American  
18 Express's arbitration clause, the same one we're disputing  
19 here, is unenforceable because it's unconscionable. They never  
20 appealed that.

21 So there's now a collateral estoppel effect. The  
22 Court has held that that arbitration clause is not operative at  
23 this point.

24 Secondly, one of the big issues here is, according to  
25 the --

1 THE COURT: Well now, wait. Let's say you're right on  
2 that, which I'm not suggesting that you're not. Are you  
3 telling me that you couldn't say that to the arbitrator?

4 MR. HALE: Well, there's another point, if I could  
5 make it, your Honor.

6 THE COURT: I'm going one point at a time.

7 MR. HALE: All right.

8 THE COURT: You said -- I think you don't have  
9 standing. You say, Oh, yes, you do. And then you cite as a  
10 reason that you don't go to arbitration is a decision from the  
11 Orange County Superior Court holding the class action bar  
12 unconscionable and that therefore American Express is  
13 collaterally estopped from litigating -- I guess that's  
14 right -- litigating that issue, to which I say: If you are  
15 right, why wouldn't you say that to an arbitrator? And why  
16 wouldn't the arbitrator then theoretically be bound by the laws  
17 of collateral estoppel?

18 MR. HALE: I suppose they would, your Honor, but  
19 there's a more --

20 THE COURT: Now, let's move to the second point.

21 MR. HALE: The more compelling reason here, and why  
22 this cannot be arbitrated, is because in the contracts involved  
23 here, in the arbitration clause, it says that the arbitrator  
24 must decide the validity of the arbitration agreement.  
25 That's -- so he would have to decide that. And --

1 THE COURT: What if he decided in your favor?

2 MR. HALE: As a matter of law, under Buckeye Check  
3 Cashing and Nagrampa, he cannot. He has no authority to  
4 evaluate -- has no jurisdiction to render an opinion as to the  
5 validity of the arbitration agreement itself. So by the  
6 Supreme Court's own holding in Buckeye Check Cashing and in the  
7 Ninth Circuit en banc decision in Nagrampa, that cannot occur,  
8 so there cannot be any arbitration whatsoever because of the  
9 central issue here.

10 As a consequence, it's a futile act. The law does not  
11 require a plaintiff to jump through a series of hoops the last  
12 of which is obstructed by a brick wall. There can be no  
13 arbitration here because the Supreme Court of the United  
14 States --

15 THE COURT: Wait, wait. I don't understand. First of  
16 all, you say -- the dispute that you have with American Express  
17 is the arbitration clause.

18 MR. HALE: No, we would like to arbitrate our claim  
19 for fraud.

20 THE COURT: But fraud was the fraud in inducing you to  
21 enter into an agreement with American Express because, you  
22 claim, there's an arbitration clause. You said, Look, you know  
23 why I got their credit card? Because they have an arbitration  
24 clause.

25 By the way, I've never heard of that in my life. I've

1 always greeted new things, and I rather enjoy that arrangement.

2 Because I hadn't thought that people go to credit card  
3 companies or buy anything because it has an arbitration clause  
4 in it, but I guess you did, or your clients do. So -- we'll  
5 see if they do or not, and that will be the subject of some  
6 litigation.

7 But I still don't quite understand why you can't go to  
8 the arbitrator and say to the arbitrator, Here, this clause is  
9 unconscionable, that should be stricken, and the arbitrator  
10 says, Fine, that's out.

11 Now, what's your next complaint? And your next  
12 complaint is what? If he strikes the class action, so he says,  
13 Yeah, you want a class action, go right ahead? I think that is  
14 unconscionable. It's out. So then what's next? You've gotten  
15 exactly what you've wanted, haven't you? Fabulous, you've  
16 gotten a deal with American Express and you're going to be able  
17 to bring class actions against them and that's why you got  
18 their credit card.

19 MR. HALE: Part of this lawsuit is as a class action.  
20 We seek to not have the remedy just based -- directed toward  
21 the plaintiffs but to a class of people.

22 THE COURT: And you're going to get it. He's going to  
23 give it to you. The arbitrator may very well give it to you.  
24 That will be wonderful. You'll probably get a lot of people.  
25 American Express has all sorts of business now because they

1 have a non class action bar.

2 MR. HALE: There's another problem with that, your  
3 Honor, in the fact that the contract with American Express  
4 prohibits a consolidation. So there cannot be a class action  
5 within the context of arbitration.

6 THE COURT: The class action provision of the  
7 arbitration agreement prevents consolidation, right? Is that  
8 your point?

9 MR. HALE: There's a ban on class actions outside  
10 arbitration.

11 THE COURT: That's going to be stricken.

12 MR. HALE: All right. But in the contract itself  
13 there's also a ban on consolidation, so there is a ban on --

14 THE COURT: What's the ban on consolidation?

15 MR. HALE: It's in the contract.

16 THE COURT: He'll throw that out, too. May very well  
17 throw that out. Then what? Then you've gotten exactly what  
18 you wanted. The only thing you don't have is any injury. But  
19 let's not quibble about that.

20 MR. HALE: Your Honor, we would argue that under the  
21 Ninth Circuit's holding in Lozano not getting what he paid  
22 if --

23 THE COURT: He may very well get what he paid for.  
24 That's my point. You may very well get what he paid for,  
25 assuming that he actually paid for it. You may get it. You



1 don't have standing. You don't have any injury.

2 MR. HALE: Well, your Honor, I respectfully disagree  
3 based on the holding of --

4 THE COURT: I'll write an opinion, and it's located on  
5 7th and Mission. You may take it right over there.

6 MR. NEWMAN: Thank you, your Honor.

7 MR. HALE: Thank you, your Honor.

8 One piece of housekeeping. There's a case  
9 management --

10 THE COURT: It's vacated. I'm throwing out the  
11 lawsuit.

12 MR. NEWMAN: Thank you, your Honor.

13 MR. HALE: Thank you.

14 (Adjourned)

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CERTIFICATE OF REPORTER

I, Connie Kuhl, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. C 07-4765 (CRB), David Lee, et al. v. American Express Travel, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

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Connie Kuhl, RMR, CRR

Wednesday, December 5, 2007